

OFF-HIRE CLAUSES

A comparison of responsibilities under off-hire clauses in English,
Norwegian and American law



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1 Introduction

1.1 Off-hire

Shipping is one of the world's most global industries servicing 90% of the world's trade¹. Even with growth in seaborne trade falling to 3.7% in 2008 from 4.5% in 2007 the United Nations Conference on Trade and Development still estimated over 8.17 billion tons of goods were shipped². Shipping like all industries is about revenue generation. A ship owner must make a large investment in hardware, a large hi tech vessel can cost over US\$150 million. Due to this a ship owner will need to have his ship generating revenue as much as possible.

There are many ways for a shipowner to use his vessel to generate income, including carrying his own cargo, voyage chartering, time chartering or even bareboat chartering, however this thesis will concentrate on time charters and specifically the phenomenon of off-hire. In a time charter an owner will agree to make a vessel available to the time charterer for a specific period of time. In return for this the charter must pay hire in relation for the time that the ship is at his disposal, as well as costs for each voyage. Due to this it is important to the owner that the vessel is at the charterers' disposal for as long as possible during the charter period. Most if not all modern charter parties will contain clauses relating to when a charterer is not liable to pay hire due to events that causes the vessel to not be able to carry out the charterers orders. This clause will generally be known as the off-hire clause, and will go into quite a lot of detail about what the parties have agreed to be an off-hire situation and what will not.

¹ www.imo.org

² United Nations Conference on Trade and Development, Review of Maritime Transport 2009

Off-hire events can have serious economic consequences for the ship owners. If the vessel is not earning hire, the owner still suffers the everyday costs of mortgage payments, crew wages, costs of wear and tear etc, therefore it is very important for the owner to have the vessel on hire for as long as possible. Inversely the charter does not want to be paying hire for a ship that is not providing him with the service he requires.

1.2 Legal Systems

In this thesis we will be looking at the concept of off-hire under three different legal systems, for the purpose of this thesis I have selected, English, Norwegian and American law. The American and English legal systems are common law systems, where case law forms a binding precedent on future cases, case law can be overridden by statute however in the field of off-hire clauses there is none in either country.

Norway is a civil law country based on the Scandinavian civil law system, statute is the main source of law, but support can be drawn from court cases, academic opinion, supporting documents and customary law. An example of customary law is 'vederlagsrisiko', this obligation under Norwegian contract law, simply put it means that if you do not achieve your results set out under the contract you will not receive compensation, but there is no liability beyond this. So for example, if the ship owner is not providing a vessel for the charterer, he will not be compensated with hire for the vessel.

In the matter of contract law there is also a difference between the two systems. In the common law system, the terms of the contract are paramount; if something is not included in the contract then it is not considered part of the contract, even if the parties may have intended it to be. Due to this a large amount of weight is placed by the courts on the wording of the contract and there legal definition will have a strong effect on the outcomes of contractual matters.

Under Norwegian contract law while the terms of the contract are obviously still very important, the courts will also look at the intention of the parties when drawing up the contract. Thus if the parties intended for something to be included in the contract, but did not include it, the courts will still take it into consideration. An example of this can be seen in the *Arica* case, which will be discussed later, when the courts found that it was the intention of the parties to interpret the off-hire clause of the charter party agreement using English law.

1.3 Aim of This Thesis

When charterer parties are drawn up they will almost always specify which countries law they would like to govern the contract and which jurisdiction any disputes will be heard. As previously discussed, countries have many different ways at looking at the same type of law. Even if the clause is exactly the same in all cases, the legal outcome of a similar dispute can be very different.

In this thesis we will look at off-hire under the three legal systems and make a comparison of the responsibilities of the parties involved, to find the similarities and differences between the three legal systems. Furthermore I will then look at one particular situation in off-hire where the law is not yet completely settle, the matter of when vessel is delayed by an off-hire situation but for some reason the charterer are prevented from using the vessel as intended during that off-hire period. The aim of all of this is to see if there is any advantage or disadvantage for an owner or charterer in making one choice of law over another.

2 The Law on off-hire under the English, Norwegian and American Law

2.1 Off-hire Under English Law

2.1.1 General Principles

As mentioned previously different charter party documents have different off-hire clauses which use different terminology and expose the owner and charterer to different risks. As English contract law relies more heavily on the wording of the contract it is much harder to produce hard rules regarding what constitutes an off-hire situation and what doesn't.

Under English law the general principle of off-hire was set out in *The Mareva A.S.*³ on page 382 by Kerr, J., "[T]he object is clear. The owners provide the ship and the crew to work her. So long as these are fully efficient and able to render to the charterers the service then required, hire is payable continuously. But if the ship is for any reason not in full working order to render the service then required from her, and the charterers suffer loss of time in consequence, then hire is not payable for the time so lost."

However, this does not mean that in all situations where the ship is not in full working order, that the ship will be off-hire. The charter must show that the off-hire clause in the charter party agreement operates in the circumstances that have arisen. This was set out in *Royal Greek Government v. Minister of Transport*⁴ Bucknill, L.J. stated "the cardinal rule, if I may call it such, in interpreting such a

³ *The Mareva A.S.* [1977] 1 Lloyd's Rep 368

⁴ *Royal Greek Government v. Minister of Transport* (1948) 82 Ll.L.Rep. 196.

charter-party as this, is that the charterer will pay hire for the use of the ship unless he can bring himself within the exceptions. I think he must bring himself clearly within the exceptions. If there is a doubt as to what the words mean, then I think those words must be read in favour of the owners because the charterer is attempting to cut down the owners' right to hire.” This was further supported in *the Doric Pride*⁵ it was set out that as ‘the risk of delay is on the time charterer, it is he that remains liable for costs of delay unless the charter can ‘bring himself within the plain words of the off-hire provision’.

What is more, it is important to remember that off-hire clauses operate entirely independently of a breach of contract, off-hire situations do not have to be a breach of contracts, as supported by Staughton, J., in *The Ioanna*⁶

Generally in English law for a ship to be put in Off-hire three conditions must be met. Firstly the full or efficient working of the vessel must have been prevented. Secondly the preventative cause must fall within those causes set out in the off-hire clause. Thirdly as a result of the prevention of full or efficient working of the vessel the charter must suffer a loss of time. We will look at each of these three conditions in the following sections.

2.1.2 Preventing the Full / Efficient working of the vessel

Two of the main terms for events that are covered by off-hire clauses are events preventing the ‘full working of the vessel’ as used in the New York Produce Exchange Form (NYPE)⁷ and events preventing the ‘efficient working of the vessel’ as used for example Shelltime 4⁸. We will first look at what constitutes an event

⁵ The Doric Pride [2006] 2 Lloyd’s Rep. 175

⁶ The Ioanna [1985] 2 Lloyd’s Rep. 164

⁷ New York Produce Form Clause 15 lines 97 to 99

⁸ Shelltime clause 21. (a)(i)

preventing the full working of the vessel before returning to look at the efficient working of the vessel.

It was Kerr, J., that explained in *The Mareva A.S.*⁹ that for the listed events that can cause off-hire under the NYPE, for example deficiency of men or stores, breakdown or damage to hull, machinery or equipment, that these events must prevent the full working of the ship. He stated on page 382 'The word "other" in the phrase "or by any other cause preventing the full working of the vessel" in my view shows that the various events referred to in the foregoing provisions were also only intended to take effect if the full working of the vessel in the sense just described was thereby prevented'.

Lord Denning M.R. put it very clearly stating in *The Aquacharm*¹⁰ at page 9. "We are to inquire first whether the 'full working of the vessel' has been prevented. Only if it has, do we consider the 'cause.'" More recently in *The Laconian Confidence*¹¹ it was held by Rix J. on page 141 that 'The first question to be answered is in any [off-hire] dispute under the clause is whether the full working of the vessel has been prevented; for if it has not, there is no need to go on to ask whether the vessel has suffered from the operation of any named cause"

However not every defect or event that arises will necessarily prevent the full working of the vessel, even if they are covered by the off hire clause. If a ship is required by the charterer to load cargo it will not be off-hire if an engine breakdown would have prevented her from sailing, if she is still capable of loading cargo. This was explained by the House of Lords in *Hogarth v. Miller*¹² where Lord Halsbury, L.C., stated that 'I should read the contract as meaning this . . . that she should be

⁹ *The Mareva A.S.* [1977] 1 Lloyd's Rep 368

¹⁰ *The Aquacharm* [1892] 1 Lloyd's Rep. 7

¹¹ *The Laconian Confidence* [1997] 1 Lloyd's Rep 139

¹² *Hogarth v. Miller* [1891] A.C. 48 (H.L.).

efficient to do what she was required to do when she was called upon to do it.’ However in *The Berge Sund*¹³ Staughton, L.J stated on page 460 “The question is not what the charterers hoped or expected their orders would be, but what service they actually required.” Furthermore Staughton L.J. explained on page 461 of *The Berge Sund* that any activity that is ‘in the ordinary way an activity required by a time charterer’ e.g. a ship is not off-hire when a charterer wants the ship set sail, but the ship is required to bunker.

However if the ship is carrying out an activity that is not ordinarily required by the charter, it will generally be considered to be preventing the full working of the vessel. An example of this can be seen in *The Clipper Sao Luis*¹⁴ where it was found that fighting a fire in the cargo hold, did prevent the full working of the vessel. Circumstances that prevent a voyage but however do not affect the standard operations of the vessel do prevent the full working of the vessel. This was well explained in *The Laconian Confidence*¹⁵ by Rix. J., on page 147 ‘A vessel is not off hire just because she cannot proceed upon her voyage because of some physicals impediment, like a sand bar, or insufficiency of water, blocking her path”.

Rix, J. went on to state that a vessel does not have to be deficient in itself. A vessel maybe prevented from working by legal as well as physical means. Therefore a ship can go into off-hire if delayed by the actions of port authorities. The actions though must be within the ‘natural or reasonably foreseeable consequence of some named cause’. In the *Laconian Confidence* the overly bureaucratic attitude of the Bangladeshi port authorities delaying the vessel for 18 days did not qualify the vessel for off-hire as their actions were not a natural or reasonably foreseeable consequence of the requirement of the vessel to dispose of 16 tonnes of left over rice sweepings. Rix, J. rejected Webster, J. view in *The*

¹³ *The Berge Sund* [1993] 2 Lloyd’s Rep 453

¹⁴ *The Clipper Sao Luis* [2000] 1 Lloyd’s Rep. 645.

¹⁵ *The Laconian Confidence* [1997] 1 Lloyd’s Rep. 139

*Roachbank*¹⁶ that the term 'preventing the full working of the vessel' can only come from an internal cause from the ship. Rix J. stated on page 150 'An otherwise totally efficient ship may be prevented from working. That is the natural meaning of those words, and I do not think that there is any authority binding on me that prevents me from saying so'.

As previously mentioned in the Shelltime 3 and 4 charter party forms the off-hire clause reads 'the efficient working of the vessel' rather than 'the full working of the vessel'. In *The Manhattan Prince*¹⁷ Leggatt, J. on page 146, interpreted the phrase 'efficient working' must enjoy the connotation of the efficient physical working" Thus any legal or administrative constraint on the vessel will only place the ship in off hire if it is a result of the physical or suspected physical condition of the ship. In *The Bridgestone Maru*¹⁸ the ship was on a Shelltime 3 charter party transporting gas from Saudi Arabia to Livorno in Italy. On Arrival at Livorno the ship was inspected by the harbour authority and the ships booster pump was found not to comply with local regulations and thus the ship was not allowed to discharge and was ordered off of berth. It was held by Hirst, J. that the ship was off-hire as while it resulted from a legal/administrative constraint it was as a direct consequence of the physical condition of the ship.

It is important to remember that is the question is whether the full working of the ship has been prevented, not whether the working of the ship has been fully or entirely prevent from working in anyway. Therefore it is enough to show that the full working of the ship has been prevented. In *Tynedale v. Anglo Soviet*¹⁹ the Horden damaged her foremast on a voyage to Liverpool, while she was still able to discharge, it was at a considerably slower rate. It was held that while she was still

¹⁶ The *Roachbank* [1987] 2 Lloyd's Rep 498.

¹⁷ The *Manhattan Prince* [1985] 1 Lloyd's Rep. 140

¹⁸ The *Bridgestone Maru* [1985] 2 Lloyd's Rep. 62

¹⁹ *Tynedale v. Anglo Soviet* (1936) 41 Com. Cas. 206 (C.A.)

on hire for the period of the voyage after the damage took place, she was off-hire for the entire period of discharge. Furthermore in *Hogarth v. Miller*²⁰ the House of Lords found that the full working of the vessel had been prevented when she was towed to Harburg, even though that was the destination of her cargo and her engine was still partially working. While these rules seem overly harsh they are generally prevented now due to the fact modern time charter off-hire clauses entitle the charter to only deduct hire for net delay of the voyage caused by the vessel not working. Furthermore most charters contain provisions that allow a deduction of hire caused when a vessel's speed is reduced during a voyage. However if the charter does contain such a clause, Staughton, J. held in page 167 of *The Ioanna*²¹, that the charterer is not entitled to hold the vessel is on full off-hire under the main off-hire clause.

2.1.3 Events set out within the off-hire clause

Once it has been established that the full working of the vessel has been prevented, as stated previously it is necessary to see whether this was caused by an event within the wording of the off-hire clause. As the terms of off-hire clauses vary from charter to charter we will look at some of the most common and important terms.

If we take the New York Produce form 1946 clause 15 for example it reads '*That the event of any loss of time from deficiency of men or stores, fire, breakdown or damage to the hull, machinery or equipment, grounding, detention by average accident to ship or cargo, drydocking for the purpose of examination or painting bottom, or any other cause preventing the full working of the vessel...*'

²⁰ *Hogarth v. Miller* [1891] A.C. 48 (H.L.).

²¹ *The Ioanna* [1985] 2 Lloyd's Rep. 164

In *Royal Greek Government v. Minister of Transport*²² the Court of Appeal held that if ship was fully crewed but the crew refused to sail, in this case because of the insistence of sailing in convoy under wartime conditions, then the term deficiency of crew did not apply. There had to be a numerical insufficiency. However it is important to realise that the off-hire clause in the case did not contain a clause such as ‘*or any other cause preventing the full working of the vessel*’ which would have probably changed the outcome of the case.

The Court of Appeal also defined the word breakdown in *The Afrapearl*²³ Clark, L.J., stated ‘As I see it a breakdown of equipment such as the discharge pipe occurs when it no longer functions as a pipe’. Therefore the cause of the breakdown does not matter, it merely a question of whether there is a breakdown or not.

In *Giertsen v. Turnbull*²⁴ Lord Ardwell held that if machinery components deteriorate over time, the component breaks down when it becomes reasonably necessary to interrupt the charter for repairs. Such deterioration however cannot be as a result of the natural use of the vessel under the charterers’ orders (*The Rijn*²⁵).

Detention was defined as “some physical or geographical constraint upon the vessel’s movements in relation to her service under the charter” by Kerr, J in *The Mareva AS*²⁶ and this was accepted by the Court of Appeal in *The Jalagouri*²⁷.

²² *Royal Greek Government v. Minister of Transport* (1948) 82 L.L.Rep 196 (C.A.)

²³ *The Afrapearl* [2004] 2 Lloyd’s Rep. 305 (C.A.)

²⁴ *Giersten v. Turnbull*, 1908 S.C. 1101

²⁵ *The Rijn* [1981] 2 Lloyd’s Rep. 267

²⁶ *The Mareva A.S.* [1977] 1 Lloyd’s Rep. 368

²⁷ *The Jalagouri* [2000] 1 Lloyd’s Rep. 515

In *The Laconian Confidence*²⁸ ‘accident’ was defined as a fortuitous occurrence which is probably not so small as to be negligible. However the fact that the clause uses the term average accident does not mean that it has to be an accident in general average, this was pointed out on page 381 of *The Mareva* by Kerr. J. when he stated ‘The owners... submit that ‘average accident’ means a ‘general average accident’. I reject this... I think it merely means an accident which causes damage.”

Like the NYPE 43 many off-hire clauses will contain a ‘sweeping up phrase’ such as the term ‘or by any other cause preventing the full working of the vessel’. In *The Laconian Confidence* Rix, J. set out that ‘... it is well established that [the words ‘any other cause’], in the absence of ‘whatsoever’, should be construed either *ejusdem generis* or at any rate in some limited way reflecting the general context of the charter and clause’. Therefore the sweep up phrase is to be taken as referring to thing similar to those already mentioned in the clause.

Rix, J. went on to state that ‘a consideration of the named causes indicates that they are related to the physical condition or efficiency of either the vessel (including its crew) or, in one instance, cargo. There is, moreover, the general context, emphasized for instance by Mr Justice Kerr in *The Mareva* AS (at page 382) that it is for the owners to provide an efficient ship and crew’. Meaning that at least for NYPE 46 charters, for a vessel to be considered off-hire under the ‘sweep up phrase’ the clause of the claimed off-hire event must be related to the ship or the crew.

Legal or administrative action taken by a port authority can apply as well as physical ones; however the action must be in relation to the actual or suspected physical condition of vessel or crew. Rix, J. stated in *Obiter* in *The Laconian*

²⁸ *The Laconian Confidence* [1997] 1 Lloyd’s rep. 139

Confidence ‘where the authorities act properly or reasonably pursuant to the (suspected) inefficiency or incapacity of the vessel anytime lost may well be off hire even in the absence of the word ‘whatsoever’.

The insertion of the term ‘whatsoever’ after ‘any other cause’ into the sweep up phrase means that the *ejusdem generis* rule no longer applies. In *The Mastro Giorgis*²⁹ it was held that the phrase covered arrest of the ship by a cargo interest, though this could well be the case without the term ‘whatsoever’. It was also suggested in obiter in *The Laconian Confidence*³⁰ that unreasonable actions by port authorities could be covered by the term ‘whatsoever’. In the recent case of *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd*³¹ Gross, J. referred to Rix, J. judgement in *The Laconian Confidence* when stating that ‘Should parties be minded to treat seizures by pirates as an off-hire event under a time charterparty, they can do so straightforwardly and most obviously by way of an express provision in a “seizures” or “detention” clause. Alternatively and at the very least, they can add the word “whatsoever” to the wording “any other cause”, although this route will not give quite the same certainty as it presently hinges on obiter dicta, albeit of a most persuasive kind.’ Meaning that term ‘whatsoever’ could allow acts of piracy to be considered as an off-hire situation under the seizure or detention clause.

However for any event to qualify under the ‘sweep up phrase’ the cause must be fortuitous and cannot be caused by something for which the charterer is responsible. An event that is the natural consequence of the orders of the charterer will not be considered fortuitous as previously stated in *The Rijn*³². Sometimes a off-hire clause will expressly exclude causes for which the charterer is responsible,

²⁹ *The Mastro Giorgis* [1983] 2 Lloyd’s Rep. 66.

³⁰ *The Laconian Confidence* [1997] 1 Lloyd’s Rep. 139.

³¹ *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd* [2010] EWHC 1340 (Comm)

³² *The Rijn* [1981] 2 Lloyd’s Rep. 267.

for example in *The Berge Sund*³³ where the off- hire clause contained the term ‘In the event that a loss of time, not caused by Charterer's fault, shall continue... for more than twenty-four (24) consecutive hours... then hire shall cease...’. However many charter party agreements do not have this written in explicitly.

There is support from the *Laconian Confidence* that the vessel would not be off-hire even when a sweep up phrase includes ‘whatsoever’ with Rix, J. stating ‘It seems there would be an implicit exclusion of causes for which the charterers where responsible.’

Sometimes there may be many circumstances that give rise to the prevention of the full or efficient working of a vessel, when this is the case it can be difficult to determine what the effective cause of the disruption is and thus whether the off-hire clause covers the event. The court has tended to look at the risks allocated under the off-hire clause and determine which risks has arisen in the disruption. In *the Doric Pride*³⁴ Rix, L.J. states on page 1053 ‘Lord Hoffmann, ...in effect has said that when you have a problem of causation you ought to begin by asking: Why do you want to know the answer to this question? For what purpose are you asking a question of causation? The insight is that you cannot answer questions of causation without knowing, as it were, what the point of the question is. In the context of [the off-hire clause in question], you are looking for an essential distinction made in the wording of that clause and reflecting an essential distinction made throughout the time charter as a whole, familiar to all owners and charterers, between matters of responsibility for owners and matters of responsibility for charterers.’

³³ *The Berge Sund* [1993] 2 Lloyd's Rep. 453.

³⁴ *The Doric Pride* [2006] 2 Lloyd's Rep. 175 (C.A.)

2.1.4 Loss of Time

Finally in order for a vessel to be considered off-hire, it must have suffered a 'loss of time'. This term can have two different meanings though, depending on the wording of the off-hire clause.

In net loss of time clauses, loss of time means the time of which the vessel is prevented from working. Clause 15 of the New York Produce form is one such clause. It was held in *The Pythia*³⁵ Robert Goff, J. interpreting net loss of time clauses to mean that off-hire was only in effect for the period of time the charter service had been delayed. Furthermore he went on to state that 'no deduction of hire is made in respect of any period after the ship is once again able to perform the service immediately required.

In *H.R. Macmillan*³⁶ it was discussed how loss of time could be calculated for a partial loss or damage to equipment. It was held that if the damage resulted in no extra time being required to complete the work, then the vessel would remain on hire, however if the break down does result in extra time being required to complete a job, it must be asked 'how much earlier would the vessel have been away from her port of loading or discharge if three cranes, instead of two, had been available throughout' in other words, how much longer did the vessel take to perform its task than would have been taken if the vessel was in full working order. It is this difference that shall be the loss of time, and therefore the period of off-hire.

When an off-hire clause covers only the loss of period of service and not any delay in progress, this is known as a period clause. In *Hogarth v. Miller*³⁷ the Lord Chancellor explained held that under a period off-hire clause as meaning 'the hirer of the ship... is not to pay during such period of time as he shall lose (that is, lose

³⁵ *The Pythia* [1982] 2 Lloyd's Rep. 160

³⁶ *H.R. Macmillan* [1974] 1 Lloyd's Rep. 311

³⁷ *Hogarth v. Miller* [1891] A.C. 48 (H.L.)

time) in the use of the ship by reason of any of the contingencies which [are covered by the period clause]’

Under English law there has been a trend to read off-hire clauses as period clauses when there is any ambiguity due to the difficulty of calculating the loss of time in a ‘net loss of time’ clause. In *The Bridgestone Maru No.3*³⁸, Hirst, J. stated when referring to the off-hire clause in Shelltime 3 that ‘The courts have always leaned strongly in favour of construing these clauses [as period off-hire clauses], to avoid the complexities of calculating the minutiae of lost time [as required by a net loss of time clause].’

2.2 Off-Hire Under Norwegian Law

2.2.1 General Overview

Off-hire under Norwegian law differs from that of English and American law; this is mainly due to the difference between the Norwegian civil law system and the common law system used in England and America. Under Norwegian law the statutory rules are based on a system of risk allocation, many of these risks will be allocated by the off-hire clause in the charter party. However when the allocation of a risk is unclear following the terms of the charter party, §392 of the Norwegian maritime code comes into effect. §392 reads as follows:

‘Hire is not paid for time lost to the time charterer in connection with salvage, maintenance of the ship, or the repair of damage for which the time charterer bears no responsibility, or otherwise because of matters pertaining to the [ship owner³⁹]. The same applies correspondingly to the obligation of the time charterer to cover expenses relating to the operation of the ship.’

³⁸ *The Bridgestone Maru No.3* [1985] 2 Lloyd’s Rep. 62

³⁹ The English translation of the Maritime code uses the term ‘time carrier’ however as ship owner is used throughout this thesis, it will be used here.

However it is important that this clause as with all clauses in chapter 14 of the maritime code must be read in conjunction with §322 of the maritime code on the freedom contract, paragraph one of which reads:

‘The provisions of the present Chapter do not apply in so far as anything to the contrary follows from the contract, practice established between the parties, or custom of the trade or other usage which must be considered binding upon the parties.’

Therefore this means §392 only comes into effect if the contract is silent or unclear on an issue. However, as with all times when statute is used to interpret contracts, when §392 should be used and when it should not, is not always straightforward.

2.2.2 Allocation of Risk

The general principle under the maritime code is that hire is payable continuously from the time of delivery till the time of redelivery, except for time lost due to ‘matters pertaining to the ship owner. However it is important to realise that a hindrance on part of the owner is not related to fault i.e. is anyone to blame for the event, but only of which party bares the risk for certain events, this was explained by Sjur Brækhus the arbitrator in *NV Karmøy*⁴⁰. Preparatory works (NOU 1993.36) maintain that the definition of ‘matters pertaining to the ship owner’ will be left up to case law. §392 sets out a list of certain events that will be considered a hindrance on part of the owner, ‘loss of time due to salvage, maintenance of the ship or repair of damage for which the charter is not responsible’. Only if the loss of time is caused by the negligence of the charterer will it have an effect on whether off-hire is to be awarded as per § 385 of the maritime code which states:

⁴⁰ ND 1950.398. *NV Karmøy*

‘The ship owner is entitled to damages for damage to the ship caused by the fault or neglect of the time charterer or anyone for whom the time charterer is responsible. If the damage arises because the time charterer has ordered the ship to an unsafe port, the time charterer is liable unless the damage is not caused by the personal fault or neglect of the time charterer or that of anyone for whom the time charterer is responsible.’ The charterer may also be liable for events that lead to a loss of time as a consequence of the master following the charterers orders.

The charter will also be responsible for certain risks, for example if the charter is unable to bring cargo to the port of loading due to risk of strike; it is the charterer that bares the risk for the chance of strike at harbour. However the risk of strike by the ship’s crew is born by the owner as under time charters it is his responsibility to provide an adequate crew⁴¹.

Furthermore *Bergen Rigoletto*⁴² the court held that matters relating to the internal operations of the ship will be held as pertaining to the ship owner. Under *Kra. Steinar*⁴³, when a ship is held by external factors these will not be interpreted as matters pertaining to the ship owner. However in *NV Karmøy* it was found that when an external factor gives rise to a internal factor on the vessel then this will be covered by the term ‘pertaining to the ship owner’.

2.2.3 Loss of Time

After it has been determined with which party the risk is placed, the next task is to determine if any time has been lost. An engine break down during a voyage from one port to another, will obviously result in a loss of time, however if the engine

⁴¹ Scandanavian Maritime law 2nd ed. Falkanger, Bull and Brautaset (2008). Univrsitetsforlaget. Page 418

⁴² *Bergen Rigoletto* ND 1944.52

⁴³ *Kra. Steinar* ND 1913.133

breakdown in port during discharge and or loading, it is unlikely to cause any delay. If the owner is unable to repair the vessel by the time the charterer is ready to order the vessel to set sail, then time will indeed be lost. What's more in the Norwegian system time can also be lost for a partial breakdown of equipment. If for example one of three cranes breaks down during discharging, the charterer will be entitled to a reduction in hire equal to the extra time taken to off load due to the damaged crane⁴⁴.

In *Hermen Wedel Jarlsberg*⁴⁵ the issue of when the full working of the vessel is partially prevented, for example a problem in the ships engine that forced the vessel to go slower during a voyage, was discussed. In this case the charterer was a pro-rata reduction in hire, thus the courts took the net loss of time approach to the off-hire clause.

In *Hindanger*⁴⁶ the vessel broke down on route from North America to Europe, rather than tow the vessel to Europe for repairs the vessel returned to New York. Norwegian arbitration panel interpreted the Baltime clause 9 in this case to be a net loss of time clause under Norwegian law however the court also found that the charter party was governed by English law. Baltime clause 9 (A)⁴⁷ under English law is normally interpreted as at period loss of time clause, this would have resulted in the charterer having to pay hire for the vessel returning to Europe. The panel in this case decided this solution would be inequitable and ruled that the owner had a duty to economise the loss of time to the charterer, based on the interpretation of the requirement of 'the master to prosecute all voyages with the

⁴⁴ Scandanavian Maritime law 2nd ed. Falkanger, Bull and Brautaset (2008). Univrsitetsforlaget. Page 418

⁴⁵ *Hermen Wedel Jarlsberg* RT 1915.881

⁴⁶ *Hindanger* ND1962.68 NV

⁴⁷ 'In the event of drydocking or other necessary measures to maintain the efficiency of the Vessel, deficiency of men or owners' stores, breakdown of machinery, damage to hull or other accident, either hindering or preventing the working of the vessel and continuing for more than twenty four consecutive hours, no hire shall be paid in respect of any time lost thereby during the period in which the vessel is unable to perform the service immediately required. Any hire paid in advance shall be adjusted accordingly'

utmost despatch'. The Arbitration panel found that the owners had breached this duty by returning to New York rather than proceed to Europe.

Under §392, off-hire is generally interpreted to use the net loss of time model, thus the vessel will be off-hire until the vessel is in a position and state that does not disadvantage the charterer compared to when the off-hire situation commenced. However as previously stated the terms of the charterer party will take prevalence. In the *Arica*⁴⁸ the courts stated that the Texacotime 2 clause 11 (A)⁴⁹, should be read literally, as it was a document formulated under English law thus, following the Norwegian system of interpreting the intention of the parties of the contract, the off-hire clause must be seen as having been formulated as a period loss clause. However it has been suggested that the decision in *Arica* should be taken with caution there were dissenting views within the tribunal with a minority believing that the court should have followed the decision in *Hermen Wedel Jarlsberg*

2.3 Off-Hire under American Law

2.3.1 General Principles

Under American law is that for a cause that results in loss of time to trigger the off-hire clause it must be a cause that is listed in the clause. If this is the case it will automatically trigger the clause. In *Commercial S.S. Co. v. West India S.S. Co.*⁵⁰ the court stated '[the offer hire clause] must be understood to state absolute categories in which the parties intended the hire to be suspended whether the owner was at fault or not....'

⁴⁸ ARICA ND 1983.309 NV

⁴⁹ '...in the event of loss of time... continuing for more than 24 hours, due to deficiency of personnel or stores, repairs, breakdown (whether partial or otherwise) of machinery or boilers, interference of authorities, collision or stranding or fire or accident or damage to the vessel or any other cause preventing the efficient working of the vessel...hire shall cease to be due or payable from the commencement of such loss of time until the Vessel is again ready and in an efficient state to resume her service from a position not less favourable to the Charterer than that at which such loss of time commenced'

⁵⁰ *Commercial S.S. Co. v. West India S.S. Co.*, 169 F. 275, 278 (2d Cir. 1990), cert. Denied 214 U.S. 523

As in English law, the American courts that operation of the off-hire clause in a charter party does not suspend the charterers other duties under the charter party as set out in *Northern SS Co. v. Earn Line*,⁵¹ and *Norwegian Shipping & Trade Mission v. Nitrate Corp. of Chile Ltd.*,⁵²

2.3.2 Loss of time

In *The Yaye Maru*⁵³ the vessel was on a charter party containing the following clause 'That in the event of the loss of time from deficiency of men or stores, fire, breakdown, or damages to the hull, machinery, or equipment, grounding, detention by average accident to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost.' The Vessel was waiting in port for an embargo on coal to clear under the charterers' orders, while waiting it was struck by another vessel and required repairs. The court held 'the right to off-hire, otherwise existing, was not lost by nonuser' it went on to state '[when the vessel broke down] the charter became entitled to off-hire, whatever permissible use he was then making of the vessel, or whether he was using her at all. He could not be held for hire when the power of use was taken away'.

However an event that does not prevent the vessel from carrying out the charterers orders at the time, but would prevent it from carry out other activities that are not required at the time, does not put the vessel on off-hire. For example a breakdown to a crane required for loading and unloading will not place a vessel on off-hire if the charterer is requiring the vessel to sail.

⁵¹ *Northern S.S. Co. v. Earn Line*, 175 F. 529 (2d Cir. 1910)

⁵² *Norwegian Shipping & Trade Mission v. Nitrate Corp. of Chile Ltd.*, 1942 AMC 1523 (Arb. at N.Y. 1942)

⁵³ *The Yaye Maru*, 274 F. 195 (4th Cir), Cert. Denied 257 U.S. 638 (1921)

The Arbitration tribunal in *The Karen C*⁵⁴ found that the charterer was not entitled to claim the vessel was on off-hire just because one of 15 cargo tanks on the vessel was not functional due to a breakdown in a pump. As the remaining 14 cargo tanks were still functional the charterer was only entitled to a pro-rata reduction of hire. Similarly in *The Shena and The Ave*⁵⁵, a pro-rata deduction in hire was given when two of five cargo cranes onboard the vessel broke down.

In *Dunlop S.S. Co. v. Tweedie Trading Co.*⁵⁶ when a off-hire clause reads 'again in an efficient state to resume her service' regarding when payment of hire shall resume after an off-hire situation, the court decided that the charter was only relieved obligations pay hire only until the vessel is restored to a seaworthy condition. However under New York Produce form, which states 'until she is again in the same or equidistant position from the destination and the voyage resumed therefrom.' The arbitration tribunal in *The Chris*⁵⁷ held that the charterer would be entitled to off-hire for the net amount of lost time. In *National Transp. Corp. v. Texaco*⁵⁸ when the off-hire clause contained the wording '...resume her service from a position not less favourable than that at which time of loss commenced' (as found in Texacotime 2). The Owner claimed hire resumed when the vessel was she completed repairs in port. The arbitration rejected this position and awarded a return of hire to the charterer for the time taken to return to a position equidistant from the intended destination at the point of time that off-hire commenced. This was also the position in *The Grace*⁵⁹ when the vessel was placed on off-hire not when stowaways were discovered but when the vessel deviated from its course

⁵⁴ *The Karen C*, SMA 3042 (Arb. At N.Y. 1994)

⁵⁵ *The Shena and The Ave*, SMA 2893 (Arb. At N.Y. 1992)

⁵⁶ *Dunlop S.S. Co. v. Tweedie Trading Co.*, 162 F.490, 493 (S.D.N.Y. 1908), *aff'd* 178 F. 673 (2d Cir. 1910)

⁵⁷ *The Chris*, SMA 199 (Arb. At NY 1958)

⁵⁸ *National Transp. Corp. v. Texaco*, 1976 AMC 1549 (Arb. at N.Y. 1976)

⁵⁹ *The Grace V*, SMA 1760 (Arb. At N.Y. 1982)

to return to the load port, until it returned to a position equidistant to the point of deviation.

2.3.3 Deficiency of Men

When The second and Third officer developed a fever resulting delaying the vessel in *Clyde Commercial S.S. Co.*⁶⁰, this was held by the court to qualify as a deficiency of men and thus the vessel was on off-hire. This was followed in *The Robertina*⁶¹ when it was held that the vessel was 'deficient in men' when the chief engineer was hospitalized. Furthermore deficiency of men may also be constructive as well as actual. In *Tweedie Trading Co. v. George D. Emery Co*⁶² an inspection of a vessel delayed replacement crew boarding the ship after it had been quarantined due to crew illness, this was held by the court to be a deficiency of men. This was followed *Gow v. Gans S.S. Line*⁶³ and *Noyes v. Munson S.S. Line*⁶⁴ when both ruled that a vessel being quarantined qualified as deficiency of crew, as did the crew being drunk in *The Canadia*⁶⁵.

The Court in *The Alcazar*⁶⁶ decided that a vessel had a deficiency in crew when a vessel was prevented from entering a U.S. port in a sensitive navel defence area restricted under the U.S./U.S.S.R Maritime Agreement by the US coast guard as the vessel had eight Polish officers on board.

A vessel can also have a deficiency of men under American law can also be triggered by industrial action by the International Transport Workers Federation (ITF), however such events will only be triggered if the crew onboard the ship are

⁶⁰ *Commercial S.S. Co. v. West India S.S. Co.*, 169 F. 275, 278 (2d Cir. 1990), cert. Denied 214 U.S. 523

⁶¹ *The Robertina*, SMA 1151 (Arb. At N.Y. 1977)

⁶² *Tweedie Trading Co. v. George D. Emery Co.*, 154 F. 472 (2d Cir. 1907)

⁶³ *Gow v. Gans S.S. Line*, 174 F. 215 (2d Cir. 1909)

⁶⁴ *Noyes v. Munson S.S. Line*, 173 F.814 (S.D.N.Y. 1909)

⁶⁵ *The Canadia*, 241 F. 233 (3d Cir. 1917)

⁶⁶ *The Alcazar*, SMA 1512 (Arb. at N.Y., 1981)

withholding labour. However the owners cannot refuse to allow the vessel to enter a port due to anticipated trouble with the ITF at the port. This was how the arbitrator read the terms of the charter party in *The United Faith*⁶⁷ even though the off-hire clause stated the vessel would only be off-hire due to boycott or blacklist that was not caused by ITF action and the vessel was ordered to complete the voyage.

Whether the unwillingness of a crew to work will be considered an off-hire event will, as with most issues, depend on the exact terminology of the off-hire clause in the charter party in question. In *United States v. The Marilena P.*⁶⁸ a strike to protest entering a war zone was considered as off-hire when the charter party contained the words ‘in the event of time lost due to deficiency of men including but not limited to strikes... payment of hire shall cease from the time thereby lost’. However if the New York Produce form was used it seems unlikely following *Edison S.S. Corp. v. Eastern Minerals*⁶⁹ it would seem unlikely that the outcome would be the same.

In *The Thunderbird*⁷⁰ the court held that the charterer could not “equitably claim that payment of hire for the time lost should be excused” when the charterer knew it was ordering the vessel into a port where industrial action was taking place. That withstanding if the charter does not contain a provision expressly stating that a vessel will go off-hire due to delays caused by strikes, the courts will not find the vessel in off-hire due to the ‘time honoured maritime doctrine’ which places the burden on the charterer for strike delays as set out in *Montauk Oil Transportation Corp. v. Sonat Marine Inc.*,⁷¹

⁶⁷ *The United Faith*, SMA 1409 (Arb. At N.Y. 1980)

⁶⁸ *United States v. The Marilena P.*, 433 F.2d 164, 1969 AMC 1155 (4th Cir. 1969)

⁶⁹ *Edison S.S. Corp. v. Eastern Minerals*, 167 F.Supp. 601 (D.Mass.1958)

⁷⁰ *The Thunderbird*, SMA 54 (Arb. At N.Y. 1964)

⁷¹ *Montauk Oil Transport Corp. v. Sonate Marine Inc.*, 871 f.2d ``69, 1989 AMC 1147 (2d Cir. 1989)

2.3.4 Loss of time by average accidents to ship or cargo

In *Barker v. Moore & McCormack Co.*,⁷² the leading case on the subject, it was held that an 'average accident' occurs when there is an unexpected functional impairment of the vessel which prevents her full use. Judge Chase states 'If the expression is construed *ejusdem generis*, it would have to mean something that prevented 'the full working of the vessel.' And we think it should be so construed.' Thus in this case bad weather that delayed the vessel and caused extra consumption of bunkers was not considered an average accident as it did not damage the ship in anyway.

Under the New York Produce form an average accident to cargo will also result in the vessel going off-hire, though this term is often deleted. When a deck stowed timber cargo collapsed in *The Andros Oceania*⁷³ this was held to be an average accident in cargo though as the accident resulted in the charterers failure to load and store the cargo, the vessel was not placed off-hire.

2.3.5 Drydocking

Under the New York Produce form, drydocking will result in the vessel going off-hire, this was confirmed by the courts in *Munson S.S. Line v. Mirimar S.S. Co.*⁷⁴ and *Falls of Keltie S.S. Co. v. United States & Australia S.S. Co.*,⁷⁵. However in *Aldis Co. v. Munson*,⁷⁶ it was held that delays while waiting for a drydock to become available will not be susceptible to off-hire. However when the owner refused to drydock near the end of a charter party and rather wait to the expiration

⁷² *Barker v. Moore & McCormack Co.*, 40 F.2d 410, 1930 AMC 779 (2d Cir. 1930)

⁷³ *The Andros Oceania SMA 2012* (Arb. at N.Y. 1993)

⁷⁴ *Munson S.S. Line v. Miramar S.S. Co.*, 166F. 722 (2d Cir. 1908), modified on other grounds 167 F. 960 (2d Cir. 1909), Cert. Denied 214 U.S. 526 (1909)

⁷⁵ *Falls of Keltie S.S. Co. v. United States & Australia S.S. Co.*, 108 F. 416 (S.D.N.Y 1901)

⁷⁶ *Aldis Co. v. Munson*, 139 F. 234 (2d Cir. 1905)

of the charterparty to do so, the court held in *Noyes v. Munson S.S. Line*,⁷⁷ that the owners were liable for the delay and the vessel was off-hire.

Under *Canadia*,⁷⁸ when fire damage required the vessel to enter a drydock for repairs. However the vessel was delayed from entering dock due to delays at birth and it was sometime before it could discharge. It was held that the vessel was on hire, for the time from when it became able to discharge to the time it actually completed discharge as the charter had use of the vessel for that period. When in a similar situation the vessel was not able to use its own cranes to discharge though, it was held in *The Canaria*⁷⁹ that this was an off-hire situation for the whole time the vessel was discharging.

2.3.6 Breakdown or damages to hull, machinery or equipment

In order for a vessel to be considered off-hire due to breakdown or damages to hull, machinery or equipment, there must be a loss of time as shown in *Steamship Knutsford Co. v. Barber & Co.*,⁸⁰ however in the same case time lost for the inspection of the damage did count as a loss of time.

For engine breakdown to cause off-hire there must be a complete breakdown, cosmetic damage will not be enough, following *American Asiatic Co. v. Robert Dollar Co.*,⁸¹ and *The Yu May*⁸². Under *Munson S.S. Line v. Mirimar S.S. Co.*,⁸³ it

⁷⁷ *Noyes v. Munson S.S. Line*, 173 F. 814 (S.D.N.Y. 1909)

⁷⁸ *The Canadia*, 241 F. 233 (3d Cir. 1917)

⁷⁹ *The Canaria*, SMA 3310 (Arb. at N.Y. 1996)

⁸⁰ *Steamship Knutsford Co. v. Barber & Co.*, 261 F. 866 (2d Cir. 1919) cert. Denied 252 U.S. 586 (1920)

⁸¹ *American Asiatic Co. v. Robert Dollar Co.*, 282 F. 743, 746 (9th Cir. 1922) cert. Denied 261 U.S. 615 (1922)

⁸² *The Yu May*, SMA 3668 (Arb. at N.Y. 2001)

⁸³ *Munson S.S. Line v. Mirimar S.S. Co.*, 166 F. 722 (2d Cir. 1908), modified on other grounds 167 F. 960 (2d Cir. 1909), Cert. Denied 214 U.S. 526 (1909)

was held that a vessels cranes not being powerful enough to deal with the charterers cargo was not an off-hire event, however it was a breach of the owners duty to provide a ship 'in every way fitted for the service'.

When a vessel was stranded, refloated and forced to deviate for repairs, it was held in *Lake Steam Shipping Co. v. Bacon*,⁸⁴ that the vessel was off-hire until it finally reached the intended port of discharge.

In *The Lendoudis Kiki*⁸⁵ arbitrators awarded partial off-hire deductions when one of five of a vessels winches was not functioning, resulting in a 1/5th reduction in hire. Similarly when one of five cranes became inoperative on a vessel in *Mandolyna*⁸⁶ the charterer was awarded off-hire at 1/5th of hire.

However without the addition of clauses relating to reduction of speed, the court in, *Steamship Knutsford Co. v. Barber & Co.*,⁸⁷ held that it would not give a pro rata reduction in hire, though the charterer may have a right to damages stemming from outside the off-hire clause.

2.3.7 Any other cause

American law follow *ejusdem generis* principles when interpreting 'sweep up phrases' in off-hire clauses. In *Edison S.S. Corp v. Eastern Minerals*,⁸⁸ Judge Wyzanski stated that the off-hire clauses 'must be interpreted in the light of the familiar *ejusdem generis* cannon of construction.' However though many

⁸⁴ *Lake Steam Shipping Co. v. Bacon*, 129 F. 819 (S.D.N.Y. 1904)

⁸⁵ *The Lendoudis Kiki*, SMA 2323 (Arb. at N.Y. 1986)

⁸⁶ *Mandolyna*, SMA 1967 (Arb. At N.Y. 1984)

⁸⁷ *Steamship Knutsford Co. v. Barber & Co.*, 261 F. 866, 870 (2d Cir. 1919) cert. Denied 252 U.S. 586 (1920)

⁸⁸ *Edison S.S. Corp. v. Eastern Minerals*, 167 F.Supp. 601, 605 (D. Mass. 1958)

arbitrations panels have followed this rule, such as *The Sea Ranger*⁸⁹, in *The Andros Island*⁹⁰ a broader test was adopted. When an owner ordered his Greek master not to enter Turkish territorial waters during hostilities between the two countries over Cyprus, the court held that while this could not be covered by off-hire clause under its conventional conception, the court held that the charterer was ‘...nevertheless effectively deprived of the services of the vessel and her crew, for which they had contracted with owners’ and thus where entitled for a refund of the hire paid for that period.

When the master of a vessel refused to berth at the port the charterer ordered, because the master believed the vessel was overdraft for the port. The Arbitration tribunal in *The Hira II*⁹¹ held that the master was not obliged to berth in overdraft condition and that the vessel was not off-hire.

Following *The Andros Oceania*⁹² if a delay is caused by a fault of the charterer then the ship will not be on off-hire. Under *The Hoegh Mallard*⁹³ a charterer’s off-hire repayment was reduced to 85% when multiple faults resulting in the failure of the vessels main engine, as one of the faults was caused by the charterer providing substandard bunkers. *The Gold Asia*⁹⁴ saw charterers claim for the costs he suffered in demurrage to a sub-charterer denied when he tried to claim them from the owner as it was caused by the owner going off-hire.

⁸⁹ *The Sea Ranger*, SMA 1240 (Arb. At N.Y. 1978)

⁹⁰ *The Andros Island*, SMA 1548 (Arb at N.Y. 1980)

⁹¹ *The Hira II*, SMA 2246 (Arb. at N.Y. 1986)

⁹² *The Andros Oceania*, SMA 2012 (Arb. at N.Y. 1984)

⁹³ *The Hoegh Mallard*, SMA 2679 (Arb. at N.Y. 1990)

⁹⁴ *The Gold Asia*, SMA 3265 (Arb. at N.Y. 1996)

2.3.8 Arrest

The general principle on whether a vessel will go off-hire when placed under arrest is as follows. If the vessel is placed under arrest due to a fault of the owners, the vessel will go off-hire. However if the vessel is placed under arrest due to a fault of the charterer, it will remain on hire. When a sub-charter arrested a vessel claiming the owner had tortuously infringed his rights by refusing to load a cargo, in *The Wismar*⁹⁵ the vessel was held as to be off-hire as the charterer was not party to the action. In *The Mesis*⁹⁶ the vessel was detained in Algeria for having caused oil pollution in the harbour, while the owners made efforts to provide security for the vessel and attended the resulting court case, it was held that the charter was not liable to pay hire for that period. In the case of *The Sea Ranger*⁹⁷ on the other hand the charterer was held liable for hire as the arrest came from a dispute with the charterer over cargo with his receivers.

2.3.9 Effect on other remedies of owner and charterer

In *Aaby v. States Marine Corp.*,⁹⁸ it was held that the off-hire clause is ordinarily the sole measure for charterer's remedy for time lost due to the contingencies. This was affirmed by Judge Hough in *The Ask*⁹⁹ where he stated 'The Ask broke down and required temporary repairs.... For such contingencies the charter party provides a stipulated measure of damages-i.e., loss of charter hire – and no other measure is permissible...'.

⁹⁵ *The Wismar*, SMA 1454 (Arb. at N.Y. 1980)

⁹⁶ *The Mesis*, SMA 2167 (Arb. at N.Y. 1985)

⁹⁷ *The Sea Ranger*, SMA 1240 (Arb. at N.Y. 1978)

⁹⁸ *Aaby v. States Marine Corp.*, 80 F.Supp. 328 (S.D.N.Y. 1948), aff'd 181 F.2d 383 (2d Cir.), cert. Denied 340 U.S. 829 (1950)

⁹⁹ *The Ask*, 156 F. 678, 681 (S.D.N.Y. 1907)

However in *Aaby* the court also pointed out that this did not remove the charterer's right to claim for consequential damages as a result of the time lost, nor does it prevent claims for breach of any other warranty set out in the charter party. For example when the owners failed to maintain the vessel to the charterers' detriment in *The Strider Isis and The Strider Juno*¹⁰⁰ the charter was entitled to damages and not limited to the off-hire clause.

In *The Polyxeni*¹⁰¹ the arbitration panel chose to reject *The Seafaith*¹⁰² which stated that the other consequential damages were not recoverable in an off-hire situation, and awarded the charterer additional damages, citing *Time Charters*¹⁰³ as support. When the Charterer was partially responsible for certain delays and had demonstrated wilful or flagrant neglect in his own duties, such as in *The Shena and The Ave*,¹⁰⁴ then the charterer has not been able to claim border relief than off-hire.

When the charterer party was frustrated due to extensive delays at the discharge port due to arrest, as in *The Stolt Capricorn*¹⁰⁵, the arbitration tribunal held that the charterer was not able to claim off-hire as well; this would have meant that the charterer would be able to claim double compensation.

Some charter party off-hire clauses will give the charterer the right to cancel if the vessel goes off-hire for a long period of time. These clauses have been upheld by the New York arbitration panel such as in *The Argo Leader*¹⁰⁶ and *The Theodora*¹⁰⁷.

¹⁰⁰ *The Strider Isis and the Strider Juno*, SMA 3606 (Arb. at N.Y. 2000)

¹⁰¹ *The Polyxeni*, SMA 1961 (Arb. at N.Y. 1984)

¹⁰² *The Seafaith* 1955 AMC 2062, 2063 (Arb. at N.Y. 1954)

¹⁰³ *Time Charters*, First edition, 1978, Michael Wilford, Terence Coghlin and Nicholas J. Healy Jnr.

¹⁰⁴ *The Shena and The Ave*, SMA 2893 (Arb. at N.Y. 1992)

¹⁰⁵ *The Stolt Capricorn*, SMA 2359 (Arb. at N.Y. 1987)

¹⁰⁶ *The Argo Leader*, SMA 2065 (Arb. at N.Y. 1985)

¹⁰⁷ *The Theodora*, SMA 2333 (Arb. at 1985)

The contract can also be frustrated due to excessive off-hire, in *The Forest Link*¹⁰⁸ the arbitration tribunal held that three months was not long enough, however it was suggested twelve months would be long enough. This was confirmed in the second *Forest Link*¹⁰⁹ case and *The Forest Enterprise*¹¹⁰ where the ship was frustrated after an off-hire situation extended for 1 year.

¹⁰⁸ *The Forest Link*, SMA 3754 (Arb at N.Y. 2002)

¹⁰⁹ *The Forest Link*, SMA 3800 (Arb at N.Y. 2003)

¹¹⁰ *The Forest Enterprise*, SMA 3742 (Arb. at N.Y. 2002)

3 Differences in responsibility for off-hire under the three legal systems

In order to make a comparison of the responsibilities of the parties for off hire under the three different legal systems we look at this from the point of view the English system and compare this with the other legal systems.

3.1.1 Differences in the general rules.

For starters when we look at the differences in responsibilities under the 3 legal systems we can see quite quickly that there are some general differences in how they approach the question. As previously stated the English law system sees the charterers' main obligation as to paying hire, in order to relieve themselves of this obligation the charterer must bring themselves clearly within the exception set out in the off-hire clause. This was set out most clearly by Bucknill, L.J. in *Royal Greek Government v. Minister of Transport*¹¹¹.

Under American law the general rule is similar however it would seem slightly stricter in their interpretation of the contract. The terms in the off-hire clause are seen as absolute categories, in which the parties intended for hire is suspended, whether caused by the owners fault or not. This was clearly set out by the court in *Commercial S.S. Co. v. West India S.S. Co.*¹¹².

Norwegian law as we have seen has a different method of looking at hire. The terms of the off-hire clause are still the first place to look for the rules determining when a vessel will be on and off-hire. However under Norwegian law however this list is not exclusive, if an event takes place that results in a loss of time for the

¹¹¹ *Royal Greek Government v. Minister of Transport* (1948) 82 Ll.L.Rep. 196.

¹¹² *Commercial S.S. Co. v. West India S.S. Co.*, 169 F. 275, 278 (2d Cir. 1990), cert. Denied 214 U.S. 523

charterer that is not covered by the terms of the off-hire clause, there is §392 NMC which can be used to help interpret the situation. The clause provides that events that cause a loss of time for the vessel will result in off-hire if they are triggered by matters pertaining to the ship owner. Furthermore if a matter pertains to the ship owner, is not an issue of fault but of allocation of risk as set out in *NV Karmøy*¹¹³.

Under all three systems it is clear that off-hire is not a matter of fault but rather risk, Norwegian law takes this a step further, risk can be allocated to the parties not just on the wording of the off-hire clause, but rather from the whole charter party agreement, though as we have seen in even under the common law system the courts can draw from outside of the off-hire clause to allocate risk to one party or the other such as in *The Yaye Maru*¹¹⁴. This means that events that would not be considered off-hire events under English and American law, because they are not covered by one of the terms in the off-hire clause, could still be considered as off-hire under Norwegian law if it can be shown that the event was caused by a risk for which the owner bears responsibility.

3.1.2 Events preventing the full/efficient working of the vessel

Under English law the first requirement for finding a vessel off-hire is to prove there is an event preventing the full or efficient working of the vessel, depending on the wording of the off-hire clause. Even if an event is clearly covered by the named events in the off-hire clause, for example engine breakdown, the event must still prevent the full or efficient working of the vessel. This rule on this was stated most clearly in *The Aquacharm*¹¹⁵ by Lord Denning, as previously stated¹¹⁶.

¹¹³ ND 1950.398. *NV Karmøy*

¹¹⁴ *The Yaye Maru*, 274 F. 195 (4th Cir), Cert. Denied 257 U.S. 638 (1921)

¹¹⁵ *The Aquacharm* [1892] 1 Lloyd's Rep. 7

¹¹⁶ See 2.1.4

While the term 'preventing the full working of the vessel' is not used as a preliminary test for off-hire under American law, with the Americans preferring to see if an event will fit into one of the clauses listed under the off-hire provision. However for a ship to be off-hire due to 'loss of time caused by an average accident of to ship or cargo' the court in *Barker v, Moore & McCormack Co.*,¹¹⁷ held that the term must be construed *ejusdem generis* with the term 'preventing the full working of the vessel'. Meaning that in order for a loss of time to qualify as an off-hire it must have resulted from an accident that prevented the full working of the vessel.

The Norwegian point of view is that hire runs continuously unless there is a 'hindrance on part of the owner' as set out under §392 of the Norwegian Maritime Code. The hindrance must be an internal matter on the ship, rather than an external event to be considered as pertaining to the owner, as set out *Bergen Rigoletto*¹¹⁸, we will cover this more in the next section.

3.1.3 Events set out within the off-hire clause

Under English law a deficiency of men has been found to require a numerical deficiency in the crew, i.e. a lack in the required number of crew with correct qualification caused by absence or illness for example (as set out in *The Royal Greek Government v. Minister of Transport*).

Under American law there is a clear difference in the interpretation 'a deficiency of men'. Illness and/or quarantine of crew members has been held to be considered deficiency of men as set out in *Clyde Commercial S.S. Co.*¹¹⁹, and *Gow v. Gans S.S. Line*¹²⁰. In the *The Alcazar*¹²¹ it was held that port state legislation preventing a

¹¹⁷ *Barker v. Moore & McCormack Co.*, 40 F.2d 410, 1930 AMC 779 (2d Cir. 1930)

¹¹⁸ *Bergen Rigoletto* ND 1944.52

¹¹⁹ *Commercial S.S. Co. v. West India S.S. Co.*, 169 F. 275, 278 (2d Cir. 1900), cert. Denied 214 U.S. 523

¹²⁰ *Gow v. Gans S.S. Line*, 174 F. 215 (2d Cir. 1909)

crew from entering a port due to their nationality also constituted a deficiency of men. If the off-hire clause contains terms relating to the strike or similar of a crew, the crews' refusal to work will normally be considered off-hire under American law (*United States v. The Marilena P.*¹²²), where this term is lacking from the off-hire clause then following *Edison S.S. Corp. v. Eastern Minerals*¹²³ the vessel will not be off-hire. However generally there is a consensus that the burden for strike delays is born by the charterer, this is set out in *Montauk Oil Transportation Corp. v. Sonat Marine Inc.*¹²⁴.

A breakdown under English is defined as when the component no longer functions as it is intended to, e.g. a crane can no longer lift cargo (*The Afrapearl*¹²⁵). The cause of the breakdown is unimportant, unless it is a direct consequence of the charterer's orders, as opposed to a defect to the machinery (*The Rijn*¹²⁶).

In American law following *Steamship Knutsford Co. v. Barber & Co.*,¹²⁷ for a ship to qualify as having suffered a breakdown of hull or machinery the vessel must suffer a loss of time. While this would seem different from the rule under English law at first, but this is not so, as all off-hire claims under English law must result in a loss of time to the charterer¹²⁸.

¹²¹ The Alcazar, SMA 1512 (Arb. at N.Y., 1981)

¹²² *United States v. The Marilena P.*, 433 F.2d 164, 1969 AMC 1155 (4th Cir. 1969)

¹²³ *Edison S.S. Corp. v. Eastern Minerals*, 167 F.Supp. 601 (D.Mass.1958)

¹²⁴ *Montauk Oil Transport Corp. v. Sonate Marine Inc.*, 871 f.2d ``69, 1989 AMC 1147 (2d Cir. 1989)

¹²⁵ *The Afrapearl* [2004] 2 Lloyd's Rep. 305 (C.A.)

¹²⁶ *The Rijn* [1981] 2 Lloyd's Rep. 267

¹²⁷ *Steamship Knutsford Co. v. Barber & Co.*, 261 F. 866 (2d Cir, 1919) cert. Denied 252 U.S. 586 (1920)

¹²⁸ See 2.1.4

In English law detention is defined as a physical or geographical constraint that has been placed on the vessel, preventing it from carrying out the charterer's orders (*The Mareva AS*¹²⁹).

American law does not look at detention or arrest in the same way, rather preferring to see who bares the risk for the arresting event similar to Norwegian law. If the vessel is placed under arrest due to a fault of the owners, the vessel will go off-hire. However if the vessel is placed under arrest due to a fault of the charterer, it will remain on hire *The Wismar*¹³⁰..

Under English law an 'average accident' is interpreted as a fortuitous occurrence which is probably no so small as to be negligible (*The Laconian Confidence*¹³¹). However the use of the word average does not mean that mean that it is a recruitment to be a general average accident.

This is very similar to American law as previously states an average accident as an unexpected functional impairment of the vessel to be interpreted *ejusdem generis* with the term 'preventing the full working of the vessel'. Meaning a vessel will only suffer an accident if it causes damage to the vessel preventing the full working of the vessel (*Barker v, Moore & McCormack Co.*,¹³²).

Norwegian Law will look at the terms in the off-hire clause, however if there is any uncertainty as to whether an event fits under the clause §392 of Norwegian Maritime Code. Under the maritime code events that are considered as to pertaining to the ship owner, will be considered as triggering off-hire events. Events pertaining to the ship owner are not a matter of fault but merely who the

¹²⁹ The Mareva A.S. [1977] 1 Lloyd's Rep. 368

¹³⁰ The Wismar, SMA 1454 (Arb. at. N.Y. 1980)

¹³¹ The Laconian Confidence [1997] 1 Lloyd's rep. 139

¹³² Barker v. Moore & McCormack Co., 40 F.2d 410, 1930 AMC 779 (2d Cir. 1930)

risk is assigned to under the charter party. To see how the risk is allocated the court will look at the whole charter party, not just the off-hire clause, however the in the supporting commentary it was clear that the drafters wanted to leave which matters that are covered under the term 'hindrances pertaining to the ship owner' up to the courts. The courts have ruled that in order to be covered by the term that the hindrance has to be related to the internal workings of the vessel (*Bergen Rigoletto*¹³³) and not an external effect on the vessel (*Kra. Steinar*¹³⁴).

As the Norwegian system uses a different methodology to the common law systems it is not so easy to make a direct comparison between how the terms of the off-hire clause are defined. It is fair to say that some of the outcomes will be very similar, for example arrest under the charterer's fault will not result in off-hire in American, English or Norwegian law. On the other hand as §392 encourages looking outside of the off-hire clause more than the other systems with naturally do so for example Piracy is likely to be covered as an off-hire event under Norwegian law where as we have seen in *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd*¹³⁵ it will not be under English law barring the wording 'any other events whatsoever being in the off-hire clause'.

3.1.4 Sweep Up Clauses.

The terms of off-hire clauses will often contain the phrase such as 'or by any other cause preventing the full working of the vessel'. Under English law, it has been decided that the term 'any other cause' should be read in *ejusdem generis* with the other causes in the contract. Only if the term contains the word 'whatsoever' is the *ejusdem generis* requirement removed. Legal and administrative actions can also cause off-hire under the 'sweep up phrase' but only if they are related to the

¹³³ *Bergen Rigoletto* ND 1944.52

¹³⁴ *Kra. Steinar* ND 1913.133

¹³⁵ *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd* [2010] EWHC 1340 (Comm)

condition or suspected conditions of the vessel. If the cause of the event is unclear due to numerous causes, the court will look at the events that occurred and risks allocated to the parties under the charter party. This is similar to §392 of the Norwegian Maritime Code, however the English law ruling only comes into effect when there are many causes to the off-hire event and it is unclear which was the operative cause.

Under American Law *ejusdem generis* also applies to the term 'or by any other cause preventing the full working of the vessel' in the majority of cases. However the arbitration tribunal in *The Andros Island*¹³⁶ this technique was abandoned in favour of a wider test, Stating 'even though a situation of off-hire in the conventional conception did not exist at any time, Charterers were nevertheless effectively deprived of the services of the vessel and her crew, for which they had contracted with Owners'. This means the American legal system here has looked outside of the off-hire clause to supplement the clause, similar to the Norwegian system under §392 of the maritime code. Under *The Andros Oceania*¹³⁷ any delay caused by the actions of the charterer will not be considered off-hire. This is the same under both English and Norwegian law. In English law following the *Laconian Confidence* even if the sweep up term contains the word 'whatsoever' a vessel will still not be in off-hire if the charterer is responsible for the cause of the delay. Under Norwegian law §392 of the maritime code explicitly states that only time lost '... for which the charterer bears no responsibility' shall be counted as off hire. What's more under §385 'The ship owner is entitled to damages for damage to the ship caused by the fault or neglect of the time charterer or anyone for whom the time charterer is responsible.'

Norwegian law relies less heavily on the wording of an sweep up phrase, this is due to the fact that the supporting law from §392 means that if an event is not specifically mentioned in the off-hire clause, it can be still be considered as an off-

¹³⁶ *The Andros Island*, SMA 1548 (Arb at N.Y. 1980)

¹³⁷ *The Andros Oceania*, SMA 2012 (Arb. at N.Y. 1984)

hire event if it can be shown that it is a 'matter pertaining to the ship owner, as previously discussed this is not a matter of fault but merely who bears the risk of the event that took place.

3.1.5 Loss of time

Under English law the final test for whether a vessel is on off-hire is whether the vessel has suffered a loss of time or not, this is the same as in American law as set out in *The Yaye Maru*¹³⁸.

When the clause is ambiguous English courts will interpret off-hire clauses as a 'period' loss of time clauses (*H.R. Macmillan*¹³⁹). This means that the vessel will only be off-hire for the period of time for which the vessel is prevented from working furthermore time made good by the owners during the off-hire period will not be made credited to the owners. Under American law when the terms of the off-hire clause are unclear the courts would probably follow the rule that the charterer is entitled to a net of overall time lost for any cause set out in the off-hire clause. The arbitration came to decision for Clause 15 of NYPE in *The Chris*¹⁴⁰. However when the off-hire clause is clearly set out as a period off-hire clause, such as in *Dunlop S.S. Co. v. Tweedie Trading Co.*¹⁴¹ the clause has been interpreted as such.

In Norwegian Law barring different terms set out under the respective off-hire clause if under §392 an event will not lead to off-hire unless causes the charterer to lose time. Furthermore the arbitration in the *Hindanger*¹⁴² ruled that following the Norwegian interpretation of the off-hire clause in *Shelltime 2*, the clause would

¹³⁸ *The Yaye Maru*, 274 F. 195 (4th Cir), Cert. Denied 257 U.S. 638 (1921)

¹³⁹ *H.R. Macmillian* [1974] 1 Lloyd's Rep. 311

¹⁴⁰ *The Chris*, SMA 199 (Arb. At NY 1958)

¹⁴¹ *Dunlop S.S. Co. v. Tweedie Trading Co.*, 162 F.490, 493 (S.D.N.Y. 1908), *aff'd* 178 F. 673 (2d Cir. 1910)

¹⁴² *Hindanger* ND1962.68 NV

be interpreted as a net loss of time clause, however as the intention of the parties was that the contract be interpreted under English law, this meant that the clause was a period loss of time clause. Even with that however the arbitration found that there was a duty of the owners to mitigate the loss of time for the charterer, which in events effectively produced a net loss of time outcome for the charterer¹⁴³.

This means that a clause that could be read as a partial loss of time clause under English law, could be a net loss of time clause under American or Norwegian law, under Norwegian law even if a clause is interpreted as a partial loss clause, the duty for the owner to economise the loss of time for the charterer could affect the outcome of the award.

Under English law loss of time due to partial damage to the vessel caused by, for example one crane of five failing while loading or off loading, the court will calculate off-hire as the difference between the amount of time would have taken without the event, and the amount of time it took with the event, this was set out in *H.R. Macmillan*¹⁴⁴. In American law, the arbitration panel in *The Karen C*¹⁴⁵ entitled the charterer to a pro-rata reduction in off-hire when one of the fifteen tanks was inoperable due to a broken pump. In Norwegian law the outcome will be the same, partial damage to the ship which results an order of the charterer taking longer than would be normal will cause the vessel to be off-hire for the amount of extra time taken¹⁴⁶.

¹⁴³ Forsinkelse I Havn, Trond Solvang, (2009), *Gylden Norsk Forlag*, page 93.

¹⁴⁴ H.R. Macmillan [1974] 1 Lloyd's Rep. 311

¹⁴⁵ The Karen C, SMA 3042 (Arb. At N.Y. 1994)

¹⁴⁶ Scandanavian Maritime law 2nd ed. Falkanger, Bull and Brautaset (2008). Univrsitetsforlaget. Page 418

4 Situations when vessel is off-hire, but the charterer is also prevented from using the vessel due to causes for which the charterer bears responsibility.

This chapter will look at situations when a vessel is delayed by an off-hire situation but for some reason the charterer are prevented from using the vessel as intended during that off-hire period, for example the vessel's engines break down on the way into a port of loading and is unable to berth for a week, however loading could not have taken place if the vessel had arrived at port because the cargo could not be delivered to the port. We will look to see what would be the likely outcome under the different jurisdictions we have discussed previously. As this question has not been explored fully by the courts in any of the three countries we must look at similar situation and draw analogy from them.

4.1.1 Does the charterer really suffer a loss of time?

Under English law, one of the main requirements for off-hire is that there is a loss of time, this loss has to be caused by one of the event's covered by the off-hire clause. As previously mentioned the English courts will interpret clauses as period off-hire clauses. This means that while the charterer would have to show that off-hire had started, e.g. full working of the vessel was prevented, by an event covered by the off-hire clause, that resulted in a loss of time, once the vessel goes into off-hire, it will be off-hire for the entire period of time that the off-hire event was affecting the ship. In *The Ira*¹⁴⁷ the vessel sailed from Ravenna to the drydocks in Piraeus in order to repair, the off-hire clause held that this would be an off-hire

¹⁴⁷ *The Ira* [1995] 1 Lloyd's Rep. 103.

situation. However while in dry dock the charterer fixed the vessel on a voyage starting in Novorossiysk, the owners argued that the vessel was therefore on hire while sailing from Ravenna to Piraeus as it was on the way to Novorossiysk. The court held that the vessel was on hire for the voyage, with Tuckey J., stating on page 106 'it is obvious that in certain circumstances it is not possible to determine what loss of time has occurred until the end of the off-hire event'. Thus it may be the case that if the charterer has benefited from the off-hire event thanks to a second event that prevents the use of the vessel caused by a responsibility of the charter, there may be a case for reduction in the off-hire payment. An example of this is if a ship is in port A waiting to sail to the port B to discharge, the vessel breaks down and cannot sail to port B, however after the breakdown industrial action hits port B which means that it would be better to discharge at port A anyway.

However one problem the owners may face on occasions like this is that following *The Fina Samco*¹⁴⁸ waiting in anchor is providing a service to the charterer. Thus if the vessel is waiting for cargo at anchor it would seem that the vessel would not suffer any loss of time if prevented from doing this by an off-hire event, but waiting at anchor is still providing a service to the charterer is still providing a service to the charterer, and the off-hire event would be denying the charter this service, thus the vessel would have lost time and be on off-hire. The same would be the case if the events were the other way round. If the vessel went off-hire, but a second event meant that the charterer could not have used the vessel in the way he intended anyway, the fact that he could not use the vessel as intended does not matter as he could still have used the vessel for the service of waiting in anchor.

¹⁴⁸ *The Fina Samco* [1994] 1 Lloyd's Rep 153.

Analogies can be made with the situations in demurrage; in the *Stolt Spur*¹⁴⁹ the owner used the vessel for his own purposes twice while the vessel was on demurrage and the charterer could not have made use of the vessel for his own purposes. The court held that as the owner was using the vessel for his own purpose they could not claim demurrage for those periods even though the owners' actions did not determent the charterer. However it would seem that legally there is a big difference between, the owner using the vessel for his own purposes, denying him the right to claim demurrage which was seen as 'double dipping' being able to benefit twice from the situation, and the charterer losing the right to off-hire even though there is an off-hire event in existence, because the charterer could not have used the vessel anyway.

Under American Law the first indication from *The Yaye Maru*¹⁵⁰ would be that the vessel would remain on off-hire for the entire time the off-hire event affected the vessel. In this case the vessel was at anchor waiting for an embargo to clear so it could load coal. While at anchor another vessel collided with the Yaye Maru, repairs were required however the embargo was still in place after the repairs were complete. The court held that the vessel was off-hire it did not matter whether the charter actually would use the vessel while an off-hire event took place, but rather since the charterer could not use the vessel; the charterer was entitled to off-hire. In fact the court states that 'Surely, the right to off-hire, otherwise existing, was not lost by non-use.... [When] the charterer became entitled to off-hire, whatever permissible use he was then making of the vessel, or whether he was using her at all. He could not be held liable for hire when the power to use was taken away'. So it would seem that certainly in situation where the charterer off-hire even if he could or would not have used the vessel had the off-hire event not happened.

¹⁴⁹ *Stolt Spur* [2002] 1 Lloyd's Rep 786

¹⁵⁰ *The Yaye Maru* 274 F. 195 (4th Cir) cert denied 257 U.S. 638 (1921)

Under Norwegian Law, there is very little case law on the issue, *Hindanger*¹⁵¹ may give some insight. Here when the owner was found responsible for creating a longer loss of time for the charterer than was absolutely necessary the Norwegian arbitration tribunal found that the owner had a duty to economise the loss of time for the charterer, and as such gave the off-hire period was extended to cover the end of the off-hire period proper till the point in time till the vessel was in a position that didn't disadvantage the charterer by imposing damages on the owner. This however was derived from the terms of the charter party which required the master to follow the charterer's orders 'with all due dispatch'. As we know the charterers main duty under the charter party is to pay hire. If the courts found it was unfair for the charterer to not have to pay hire in an off-hire event even though an additional event under the charterers control prevented him from using the vessel anyway, could the courts find a similar duty for the charterer in order to balance out the situation? This would seem very unlikely as no charter party lays out a duty for the charter to make use of the ship, therefore it would seem unlikely that a court would find a charterers' inability to use the vessel as reason to place a vessel back on hire or to award damages to the owner.

Under the Norwegian concept of 'vederlagsrisiko' in contract law, if the owner was incapable for rendering his services to the charterer, the charterer will be entitled to off-hire even if he was not going to use the service anyway, the charterer is still denied the service for which he would have been paying¹⁵². If in a charter party with a period loss of time off-hire clause if the charterer gained an advantage from the off-hire situation, such as the situation in *The Ira* where the vessel sailed towards port of loading on way to drydocks, it could be conceivable under the Norwegian concept of 'rimelighet' or fairness in contract law, that there would be a reduction in off-hire for the beneficial part of the voyage.

¹⁵¹ Hindanger ND1962.68 NV

¹⁵² Scandanavian Maritme law 2nd ed. Falkanger, Bull and Brautaset (2008). Univrsitetsforlaget. Page 417

So it would seem that even though charterer may not suffer any real loss of time when an off-hire event coincides with a delaying event under the charterers responsibility, under all three legislations it will not make a difference to the outcome of the off-hire remedy, the charterer is paying for the ships services to be available to him, when this is denied, his intention or ability to use the vessel had it not been denied becomes immaterial.

4.1.2 Does the charterer contribute to the loss of time

Can an event for which the charterer is responsible that would have prevented the vessel from being used as intended by the charterer be considered a contribution to the loss of time if the vessel is already on off-hire?

When a loss of time event is caused solely by the actions of the charterer, many off-hire clauses will contain provisions preventing this from qualifying as off-hire. Even if this is not strictly covered it has been held by English courts that if the charterer is responsible for the loss of time, the vessel will not be held in off-hire (*The Laconian Confidence*). In *The Berge Sund*¹⁵³ Steyn, J., held that something being the fault of the charterer, did not require conscious wrongdoing or negligence on his part, but rather merely refers to a causal connection between the time lost and something done or omitted by the charterer. However these cases are regarding events that the causation of the off-hire event, rather than other events that happen during off-hire for which the charterer is responsible that would have contributed to a loss of time. However it has been suggested that if the charterer is responsible partially for an off-hire event, that the vessel should be placed on off-hire but then allow the owners to claim back hire as damages from the charterer. In *The Dodecanese*¹⁵⁴ the vessels engine broke down while in port in Egypt when

¹⁵³ *The Berge Sund* [1993] 2 Lloyd's Rep 453.

¹⁵⁴ *The Dodecanese* [1953] 2 Lloyd's Rep, 47.

the authorities delayed repairs to a vessel that had to take place because the charterer had been carrying arms into Egypt for the Royal Air Force against the Egyptian authorities' regulations. Due to this the repairs took 30 days rather than 4, the court held that the vessel was off-hire for the entire 30 days, owner was able to claim damages 24 days of hire as the charterer had breached the 'lawful merchandise' clause in the charter party. However in order for this to be a viable option for the owner the charterer has breached one of his obligations under the contract.

Again under American law the vessel will not go off-hire for any time lost caused by the charterer, as set out in *The Andros Oceania*¹⁵⁵. However this will mean in order for the vessel to go off-hire the charter would have to have triggered the initial event, and not just an event after the vessel had gone into off-hire. Even then if the charterer contributes to the initial off-hire situation if the owner is still partially responsible for the event there will only be a partial reduction of the hire, in proportion to the allocation of the contributing factors following *The Hoegh Mallard*¹⁵⁶.

Under §392 of the Norwegian Maritime Code, the owner is only responsible for losses of time for which the time charterer bears no responsibility. Section §385 of the Norwegian Maritime code also makes the charterer responsible for any damages he causes to the ship, caused by his orders or the actions of those for whom he is responsible. However this will probably not be relevant if the vessel is already off-hire before the event for which the charterer is responsible takes effect.

From this we can see that if the hindrance on the part of the charterer does not contribute to the original cause of the off-hire event, it is not going to have an effect on the remedy to the off-hire situation. However if the actions of the charterer

¹⁵⁵ *The Andros Oceania* SMA 2012 (Arb. At N.Y. 1984)

¹⁵⁶ *The Hoegh Mallard*, SMA 2679 (Arb. at N.Y.)

cause an increase in the loss of time, even though they are not directly related to the cause of the off-hire event, in the English courts at least, this can trigger a reduction in the off-hire period in proportion to the delay as we see in *The Dodecanese*¹⁵⁷.

¹⁵⁷ *The Dodecanese* [1953] 2 Lloyd's Rep, 47.

5 Conclusion

We can see from the three different views on the subjects that there are different ways of looking at the situations. When picking a jurisdiction and choice of law that will apply to the contract, ship owners and charterers will often choose the default choice set out in the standard contract, which will generally be English or American law or that which is most familiar to them, such as the law of their country of residence. However as we have seen the choice of law can have large effects on the liabilities of both parties to the contract.

English and American law are both common law countries, meaning that the law has developed through the courts with precedents developing the law binding on future cases. The in both jurisdiction can have their case law supplemented by statute, statute is considered higher law and will override any differing precedents set by the courts. However in the field of off-hire in both English and American Law there is no statute on the subject. As we have seen even though the courts have used very similar methods to analyses the same subject and in most cases even the same text, the outcome in interpreting off-hire clauses. In comparison Norwegian Law is a civil law system, based on the Scandinavian system. This is based on statute but supported by other sources such as customary law, academic opinions, supporting documents, and case law. In Norway case law only becomes binding when handed down by the Supreme Court. In the field of off-hire the law is built around Norwegian contract law, supported by the Norwegian maritime code, academic opinion on the subject, the supporting documents to the maritime code and case law on the subject.

Even with the differences between the common law system and the Scandinavian civil law system operated in Norway, it is interesting to see that sometimes the Norwegian system results in an outcome closer in similarity to one of the common law countries, though the legal methods of coming to the outcomes tend to be markedly different. Examples of this can be seen in the similarity between American Law and Norwegian Law in interpreting how loss of time should be calculated. In both instances when the clause is unclear as to how loss of time should be calculated, the courts have decided to interpret that clause as net loss of time clause, however in English law the court will interpret it as a partial loss of time clause.

Even though the common law countries will tend to determine off-hire situations by seeing if an event fits under the definition of one of the causes named in the off-hire clause, we have seen this does not stop them looking at the whole charter party agreement for help when it is unclear as we saw in sec.2.1.3 when discussing *The Doric Pride*¹⁵⁸ and in sec. 2.3.7 when discussing the *The Andros Island*¹⁵⁹. Even though the common law countries have only done this in very narrow circumstances, this would seem very similar to the Norwegian system of risk allocation.

All three systems have come up with very different ways of resolving off-hire situations, the English law system has set up the three tests of proving that the full working of the vessel has been prevented, the prevention must be caused by and event listed under the off-hire clause and finally the event must have caused the vessel to suffer a loss of time. The American system requires that an event that affects the vessel, be listed under the off-hire clause which are seen as absolute categories in which the parties intended the hire to be suspended. The Norwegian system will look at the off-hire clause but when this is unclear the Norwegian

¹⁵⁸ *The Doric Pride* [2006] 2 Lloyd's Rep. 175 (C.A.)

¹⁵⁹ *The Andros Island*, SMA 1548 (Arb at N.Y. 1980)

maritime code provides support to the courts. §392 of the Norwegian Maritime code is the section that relates to off-hire, it states that the vessel is off-hire when there is a loss of time caused by events pertaining to the ship owner, this is not a matter of fault but rather on whom the risk for the event is placed by the charter party.

Even with the distinct terms that cause off-hire set out in the off-hire clauses there are different ways of looking at them, Sometimes the outcome is very similar, as is the case with the term average accident, which under English law, is seen as 'a fortuitous occurrence which is probably not so small as to be negligible' under American law is defined as an unexpected functional impairment of the vessel which prevents her full use. In other situations the terms are looked at in very different ways, under English law a deficiency of men must manifest itself in a numerical lack off crew, where the term can cover events such as worker strikes and denial of entry to ports due to a crews nationality under American law.

One of the main differences between the common law systems and the Norwegian system can be seen when looking at the sweeping up clause. In both common law systems unless the word 'whatsoever' is included in the off-hire clause the terms such as 'or any other similar event' will be construed *ejusdem generis* with the other listed terms in the off-hire clause. However with the support of §392 in the Norwegian Maritime code, the courts in Norway will look at how risk has been allocated throughout the charter party to see if a risk not covered by the named risk in the off-hire clause will trigger off-hire.

In the fourth chapter we took a look at a particular aspect of off-hire, relating to when a vessel is delayed by an off-hire situation but for some reason the charterer are prevented from using the vessel as intended during that off-hire period. It could have been thought that the 3 different legal systems would have viewed this situation in many different ways; however it seems that the outcome under all three

jurisdictions is the same, once a charterer is deprived of the service of the vessel it does not matter if he intended to, or even could have used the vessel had it been available to him the vessel will be off-hire. Only if the event pertaining to the charterer extends the length of the off-hire event will there be any change to the remedy for the off-hire award for example when the charterer carries an illegal cargo on the vessel and this results in a longer repair time for the vessel when it has an engine breakdown, similar to the situation in *The Dodecanese*¹⁶⁰.

At the beginning of this thesis the intention was to see if there was any clear advantage for the charterer or the ship owner to choose one of the legal systems over either of the other two. From what we have seen, we can see there could be a slight advantage to the charterer to choose Norwegian law as it provides him with extra cover in off-hire situations thanks to the risk allocation system set out under §392 of the maritime code. Inversely the owner would benefit from picking one of the two common law systems, with the English preference for period off-hire clauses probably making it more beneficial than the American system. However in reality the differences between the three systems tend to be much more based in method than the legal outcome.

¹⁶⁰ *The Dodecanese* [1953] 2 Lloyd's Rep, 47.

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